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Civil Rights - Race Discrimination - Title VII of the Civil Rights Act of 1964 - Res Judicata - Individual Actions Subsequent to EEOC Actions

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CIVIL RIGHTS—RACE DISCRIMINATION—TITLE VII OF THE CIVIL RIGHTS ACT OF 1964—RES JUDICATA—INDIVIDUAL ACTIONS SUBSEQUENT TO EEOC ACTIONS—The United States Court of Appeals for the Fifth Circuit has held that dismissal for failure to comply with the Administrative Procedure Act of a Title VII employment discrimination action brought by the Equal Employment Opportunity Commission is res judicata as to an individual's subsequent private action based upon the same claim.

Jones v. Bell Helicopter Co., 614 F.2d 1389 (5th Cir. 1980).

In 1966, John Henry Jones, a black male, filed three employment applications with Bell Helicopter Textron (Bell Helicopter) at its Fort Worth, Texas plant, but was granted no employment interview. Believing that he had been denied an interview and a job because of racial discrimination, Jones filed charges with the Equal Employment Opportunity Commission (EEOC) against Bell Helicopter alleging violation of Title VII of the Civil Rights Act of 1964.[1] Two years after his initial employment applications were filed, the EEOC found reasonable cause to process Jones' claim.[2] In 1969 or 1970, the EEOC referred the complaint to the Justice Department for prosecution.[3] The Justice Department pursued the claim only to the point of requesting from Bell Helicopter information pertaining to Jones' claim.[4] Thereafter, no further action was taken until February of 1975, when the EEOC proposed to Bell Helicopter acceptable conditions for conciliation of Jones' complaint and the complaints of twelve others.[5] Finally, in September of

1. Jones v. Bell Helicopter Co., 614 F.2d 1389, 1389 (5th Cir. 1980). Jones alleged racial discrimination in hiring and employment practices in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976). EEOC v. Bell Helicopter Co., 426 F. Supp. 785, 788 (N.D. Tex. 1976). Under the enforcement provisions of Title VII, a person alleging that an employer has engaged in an unlawful employment practice must file a charge with the EEOC. The EEOC then serves notice of the charge on such employer within 10 days of its filing, followed by an investigation of the charges. Such charges are filed in writing and are submitted under oath or affirmation. 42 U.S.C. § 2000e-5(b) (1976).

2. 614 F.2d at 1389. After Jones' claim had been filed, but before the EEOC processed the claim, Bell Helicopter offered Jones a file clerk position on the night shift at the Fort Worth plant. Jones rejected this offer because it was inferior to the civil service post he then held. *Id.*

3. *Id.* The EEOC did not gain authority to prosecute its own actions until 1972. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 4, 86 Stat. 103 (codified at 42 U.S.C. § 2000e-5(a) (1976)).

4. 426 F. Supp. at 792. The last communication between the Justice Department and Bell Helicopter was on December 15, 1970. *Id.*

5. 614 F.2d at 1389. Conciliation letters are sent by the EEOC to the alleged discriminator prior to any civil action in an effort to achieve some settlement between the

1975, the EEOC filed suit in federal district court against Bell Helicopter seeking redress for Jones and the twelve others.[6] Jones apparently was not informed of the status of his complaint until suit was filed.[7] He made no effort to intervene in the suit against Bell Helicopter.[8]

On December 6, 1976, Judge Mahon, of the United States District Court for the Northern District of Texas, dismissed the EEOC claim with respect to Jones' 1966 employment applications, finding an inordinate delay of seven years between the determination of cause and the issuance of conciliation letters.[9] The court found this unexcused delay to be in violation of the Administrative Procedure Act.[10] Although the dismissal was certified as an appealable order, no appeal was taken by the EEOC.[11]

Thereafter, Jones requested a right-to-sue letter from the EEOC,[12] which was issued on April 29, 1977.[13] Jones filed suit in federal district court against Bell Helicopter on May 23, 1977, alleging discrimination in hiring violative of Title VII.[14] The district court dismissed Jones' complaint, holding that the prior EEOC dismissal was res judicata on the merits of Jones' complaint.[15]

On appeal, a three-judge panel of the United States Court of Appeals for the Fifth Circuit[16] affirmed the district court decision, holding that a dismissal of an EEOC employment discrimination action for failure to comply with the Administrative Procedure Act is res

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alleged discriminator and the aggrieved party by persuasion and suggestion. *See* 42 U.S.C. § 2000e-5(b) (1976).

6. 426 F. Supp. at 792.

7. 614 F.2d at 1389-90.

8. *Id.* at 1390.

9. 426 F. Supp. at 790-93. The district court commented that the only apparent reason for such an inordinate delay is administrative lethargy and inertia. The court further noted the importance of keeping a defendant on notice that charges are pending and commented that the EEOC failed even to pursue this simple procedure. Finally, the court found that Bell Helicopter had demonstrated that it was prejudiced by the delay. *Id.* at 793.

10. *Id.* at 792-93. *See* 5 U.S.C. §§ 555(b), 706(1), (2) (1976).

11. Brief for Appellee at 8, EEOC v. Bell Helicopter Co., 426 F. Supp. 785 (N.D. Tex. 1976).

12. *See* 42 U.S.C. § 2000e-5(f)(1) (1976). If within 180 days from the filing of a charge the EEOC has not filed a civil action or entered into a conciliation agreement to which the aggrieved individual is a party, the EEOC must notify that individual of his right to sue within 90 days after receipt of the notice that conciliation has failed. *Id.*

13. 614 F.2d at 1390.

14. Jones v. Bell Helicopter Co., No. CA 4-77-137 (N.D. Tex., filed May 23, 1977).

15. *Id.*

16. Judge Wisdom wrote the opinion of the unanimous panel, which also included Judges Johnson and Politz.

judicata as to the individual's subsequent private action based upon the same claim.[17] Relying on Federal Rule of Civil Procedure 41(b),[18] the court construed the prior dismissal of the EEOC action[19] to operate as an adjudication on the merits of Jones' claim, thereby precluding further prosecution of that claim in later suits.[20] The court distinguished *Truvillion v. King's Daughters Hospital*, in which it had allowed an individual to maintain a private action under Title VII subsequent to a dismissal of an EEOC action on the same claim.[21] In *Truvillion* the EEOC action was dismissed because of the EEOC's failure to meet procedural prerequisites to suit.[22] The Supreme Court has characterized such procedural dismissals as "jurisdictional" for the purposes of Federal Rule of Civil Procedure 41(b).[23] Thus, in *Truvillion*, unlike in *Jones*, the dismissal of the EEOC action did not reach the merits and did not bar the individual's subsequent action.[24]

Finally, the *Jones* court looked to the behavior of both the EEOC and Jones in proceeding with the claim against Bell Helicopter.[25] The court found that the EEOC's inept, slothful, and indifferent behavior was contrary to its purpose to protect substantive rights.[26] Despite the EEOC's overwork and understaffing, the court refused to accept its delay.[27] The court concluded by noting that although Jones showed a lack of interest in pressing his claim, he did not deserve to be penalized by the EEOC's failure to provide decent governmental process.[28]

Prior to the 1972 amendment[29] to Title VII, the EEOC was without

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17. 614 F.2d at 1391.

18. FED. R. CIV. P. 41(b) provides:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits.

Id.

19. 426 F. Supp. at 794.

20. 614 F.2d at 1390.

21. *Id.* at 1390. *See* Truvillion v. King's Daughters Hosp., 614 F.2d 520 (5th Cir. 1980).

22. 614 F.2d at 524. *See* 614 F.2d at 1390. The procedural prerequisites to suit are: (1) notice by the EEOC to the respondent and (2) a good faith investigation by the EEOC. 614 F.2d at 524. *See* note 1 *supra*.

23. Costello v. United States, 365 U.S. 265, 285 (1961). *See* 614 F.2d at 1390.

24. 614 F.2d at 524. *See* 614 F.2d at 1390.

25. 614 F.2d at 1391.

26. *Id.* The broad congressional purposes underlying Title VII are: (1) to eliminate the social disaster of racial, religious, and sex discrimination in employment opportunity, and (2) to enact prompt and effective methods to accomplish this goal. H.R. REP. No. 238, 92d Cong., 1st Sess., *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2138, 2148.

27. 614 F.2d at 1391.

28. *Id.* Although the court noted that Jones did not deserve to be penalized, it nevertheless affirmed the district court judgment. *See id.*

29. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

power to enforce an employee's rights.[30] Because the EEOC lacked enforcement power its role was that of a conciliator.[31] Where conciliation failed, the EEOC was forced to refer the complaint to the Justice Department for prosecution, or the individual had to maintain a private action against his alleged discriminator.

The 1972 amendment gave the EEOC authority to enforce its own actions by filing civil lawsuits against the charged party.[32] Because private enforcement remedies were not rescinded,[33] the potential exists for duplicative litigation by the EEOC and the aggrieved individual to enforce similar employment rights.

Generally, the courts have dealt with this duplication problem in one of three ways: (1) the dismissal of duplicative actions, (2) the consolidation of actions, or (3) the restriction of the party bringing the second action to intervention in the prior suit. Courts following the first approach have reasoned that preclusion of the subsequent EEOC or private action is necessary to prevent a duplication of proceedings.[34] Some courts, however, refused to bar subsequent EEOC actions that were broader in scope than the private action.[35] Title VII claims involve the vindication of a major public interest.[36] Thus, these courts

30. *See* Choate v. Caterpillar Tractor Co., 402 F.2d 357, 359 (7th Cir. 1968). The original statute gave the EEOC no enforcement powers through the adjudicatory process. It merely allowed the EEOC to investigate charges and attempt to gain compliance by informal methods of conference, conciliation, and persuasion. Enforcement of the rights of aggrieved parties resided exclusively in either the individual or the Justice Department. *Id.*

31. *See* 42 U.S.C. § 2000e-5(b) (1976): "If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion." *Id.*

32. 42 U.S.C. § 2000e-5(a) (1976).

33. *See id.* § 2000e-5(f)(1).

34. *See* EEOC v. Rexall Drug Co., 9 Empl. Prac. Dec. ¶ 9936 (E.D. Mo. 1974) (EEOC action dismissed; court observed in dictum that the filing of a private action by an aggrieved party during the statutory period would preclude the EEOC from subsequently filing its own action); EEOC v. Kimberly-Clark Corp., 380 F. Supp. 1106 (W.D. Tenn. 1974), *rev'd and remanded*, 511 F.2d 1352 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975) (EEOC action dismissed, by estoppel, when pursued after the aggrieved parties brought individual suits and signed agreements amounting to waivers of those claims, in settlement thereof); EEOC v. Union Oil Co., 369 F. Supp. 579 (N.D. Ala. 1974) (EEOC action dismissed; EEOC loses its power to sue upon the filing of a private action involving the same charge); EEOC v. Cronin, 370 F. Supp. 579 (E.D. Mo. 1973) (EEOC action dismissed; prior filing and prosecution of a private class action pursuant to a "right-to-sue" notice precludes later filing of a duplicitous action by the EEOC).

35. *See, e.g.*, EEOC v. McLean Trucking Co., 525 F.2d 1007 (6th Cir. 1975); EEOC v. Huttig Sash & Door Co., 511 F.2d 453 (5th Cir. 1975); EEOC v. Eagle Iron Works, 367 F. Supp. 817 (S.D. Iowa 1973).

36. A Joint Conference Committee is formed to resolve the differences between the House version and the Senate version of pending legislation. The Joint Conference ver-

reasoned that a subsequent EEOC claim is not repititious because it encompasses allegations and relief extending beyond that sought in the private action.[37]

The United States Court of Appeals for the Third Circuit, following the second approach, has interpreted Title VII to allow subsequent EEOC actions, and has handled duplicity problems by consolidating the actions under Federal Rule of Civil Procedure 42(a).[38] However, this approach is unavailable if, as in *Jones*, the first action has already been finally resolved.

Courts following the third approach have relegated the party bringing the second action to his right of intervention in the prior suit. The first decision clearly restricting subsequent action to intervention was *EEOC v. Missouri-Pacific Railroad*,[39] wherein the EEOC was limited to permissive intervention in the private suit under Federal Rule of Civil Procedure 24(b).[40] Title VII allows the EEOC permissive intervention in any private action because Title VII cases are of general public importance, and the EEOC's intervention guarantees that the broader public interest in eliminating the discriminatory practice will be enforced.[41] The EEOC's ability to intervene is permissive because it can represent its interest in any private action and a determination in one action

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sion is then reported to the House and the Senate for final passage. The Joint Conference Committee, in its section-by-section analysis of Title VII noted that Title VII claims involve the vindication of a major public interest. *See* 118 CONG. REC. 7168 (1972).

37. *See* EEOC v. McLean Trucking Co., 525 F.2d at 1010-11 (EEOC was not precluded from maintaining a separate action after the individual complainant's action was dismissed without prejudice in connection with a compromise settlement between the complainant and his employer); EEOC v. Huttig Sash & Door Co., 511 F.2d at 454 (where a charging party's suit had been terminated, the EEOC was permitted to bring its own suit based upon the same charge); EEOC v. Eagle Iron Works, 367 F. Supp. at 821-22 (where a charging party's suit had been dismissed, the EEOC was permitted to bring its own suit based upon the same charge).

38. *See* EEOC v. North Hills Passavant Hosp., 544 F.2d 664 (3d Cir. 1976). FED. R. CIV. P. 42(a) provides:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Id.

39. 493 F.2d 71, 75 (8th Cir. 1974). In dictum, the *Missouri-Pacific* court mentioned that intervention of right was the appropriate procedure by which a private individual could pursue an action subsequent to the filing of an EEOC action. *Id.*

40. FED. R. CIV. P. 24(b) provides for permissive intervention as follows: "Upon timely application anyone shall be permitted to intervene . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . ." *Id.*

41. 42 U.S.C. § 2000e-5(f)(1) (1976) provides: "Upon timely application, the court may, in its discretion, permit the Commission . . . to intervene in such civil action upon certification that the case is of general public importance." *Id.*

does not bind the EEOC in subsequent actions.[42] Following *Missouri-Pacific*, courts[43] have applied this approach to subsequent private actions, holding that when the EEOC files the prior action,[44] an individual's only recourse is his intervention of right in the EEOC action as provided in Title VII[45] and in Federal Rule of Civil Procedure 24(a).[46] A private litigant's right to intervene is absolute because his interests are before the court in only one EEOC action. Thus, he must intervene or be bound by the outcome of that action.[47]

Although *Jones* is in line with this trend,[48] it is distinguishable from these cases because in *Jones* the EEOC action was concluded prior to the commencement of the individual action.[49] The EEOC action was dismissed because of the EEOC's dilatory conduct,[50] thus, there was never in fact a trial on the merits.[51] Allowing Jones to proceed with his individual action would be the first judicial consideration of the alleged discrimination and thus would present no duplicity. However, because the prior judgment was on the merits for purposes of Federal Rule of Civil Procedure 41(b),[52] the court was able to rest its dismissal of Jones' action upon the doctrine of res judicata.[53]

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42. *See* note 40 *supra*.

43. *See, e.g.*, McClain v. Wagner Elec. Corp., 550 F.2d 1115 (8th Cir. 1977); Crump v. Wagner Elec. Corp., 369 F. Supp. 637 (E.D. Mo. 1973).

44. Under the statute, the EEOC is given exclusive authority to commence an action during the first 180 days following the filing of a charge by an aggrieved party. *See* 42 U.S.C. § 2000e-5(f)(1) (1976).

45. 42 U.S.C. § 2000e-5(f)(1) (1976) states: "The person or persons aggrieved shall have a right to intervene in a civil action brought by the Commission . . . ." *Id.*

46. FED. R. CIV. P. 24(a) provides for intervention of right as follows:

> Upon timely application anyone shall be permitted to intervene in an action . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest . . . .

Id.

47. *See id.*

48. The majority of the circuits hold that the party bringing the subsequent action is limited to intervention in the prior action. *See, e.g.*, Johnson v. Nekoosa-Edwards Paper Co., 558 F.2d 841 (8th Cir.), *cert. denied*, 434 U.S. 920 (1977); McClain v. Wagner Elec. Corp., 550 F.2d 1115 (8th Cir. 1977); EEOC v. Continental Oil Co., 548 F.2d 884 (10th Cir. 1977); EEOC v. Occidental Life Ins. Co., 535 F.2d 533 (9th Cir. 1976), *aff'd*, 432 U.S. 355 (1977); EEOC v. Missouri-Pac. Ry. Co., 493 F.2d 71 (8th Cir. 1974); Crump v. Wagner Elec. Corp., 369 F. Supp. 637 (E.D. Mo. 1973).

49. The EEOC action was concluded on December 6, 1976. 426 F. Supp. at 785. Jones' individual action was commenced on October 4, 1977. *See* Jones v. Bell Helicopter Co., No. CA 4-77-137 (N.D. Tex., filed May 23, 1977).

50. *See* note 9 and accompanying text *supra*.

51. *See* note 18 and text accompanying notes 18-20 *supra*.

52. *See* notes 18-20 and accompanying text *supra*.

53. 614 F.2d at 1390.

Historically, the doctrine of res judicata has been a "principle of peace,"[54] striving to give effect to final judgments by binding all parties and their privies to the determination, thus putting a resolute end to the litigation.[55] Although Jones was not a party to the initial EEOC suit, his interests were theoretically represented by the EEOC[56] giving Jones privity in the action and the decision. Failing to intervene in that action,[57] Jones allowed judgment to pass, binding himself to that judgment and precluding his subsequent private action.[58] However, the ineptness with which the EEOC handled Jones' charges raises the question of whether he was in fact represented.

All examination of the checks and balances in the statutory scheme of Title VII reveals that a portion of the responsibility for this lack of representation must rest with Jones himself. The statutory scheme of Title VII was designed to guarantee individual rights. The statute prescribes a 180-day period immediately following the filing of discrimination charges wherein the EEOC has the exclusive authority to maintain an action on the individual's behalf.[59] This allows the EEOC to investigate the charge thoroughly and attempt conciliation before any legal action may be commenced. Once conciliation fails, the EEOC has authority to maintain an action on the charge.[60] Title VII also provides to individuals the right to intervene in EEOC actions.[61] This right is a built-in protective device of the private interest. By exercising his right of absolute intervention, the individual can insure that he

54. Stevenson v. International Paper Co., 516 F.2d 103, 109 (5th Cir. 1975) (quoting Bennet v. Commissioner, 113 F.2d 837, 839 (5th Cir. 1940)). *See also* Seaboard Coast Line R.R. v. Gulf Oil Corp., 409 F.2d 879, 881 (5th Cir. 1969); Opelousas-St. Landry Sec. Co. v. United States, 66 F.2d 41, 44 (5th Cir. 1933).

55. The Supreme Court has stated that a "right, question or fact" distinctly put in issue and directly determined by a court acting within its jurisdiction cannot be disputed in a subsequent suit by the same parties. Southern Pac. R.R. v. United States, 168 U.S. 1, 48 (1897). *See* Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525-26 (1931) ("Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled between the parties"). *Id. See also* Stevenson v. International Paper Co., 516 F.2d at 109; Bennet v. Commissioner, 113 F.2d 837, 839 (5th Cir. 1940).

56. *See* 42 U.S.C. § 2000e-5(f)(1) (1976).

57. 614 F.2d at 1390.

58. *Id.* at 1389-90. *Cf.* Truvillion v. King's Daughters Hosp., 614 F.2d 520 (5th Cir. 1980) (EEOC dismissal for failure to meet procedural prerequisites to suit, characterized as jurisdictional, did not bar the individual's subsequent action). *See* notes 21-24 and accompanying text *supra*.

59. 42 U.S.C. § 2000e-5(f)(1) (1976).

60. *Id.* § 2000e-5(a).

61. *Id.* § 2000e-5(f)(1). This right is also provided by FED. R. CIV. P. 24(a). *See* note 46 *supra*.

will be heard by the court and can also request additional relief, should he consider the EEOC prayer for relief unsatisfactory.

Additionally, the statute reserves the private right of action as a final check against EEOC inaction and delay.[62] If the EEOC finds no merit in the discrimination charge or if it fails to file an action against the alleged discriminator within 180 days, they must so notify the individual who may then maintain a private action.[63]

This statutory scheme may justify what, at first glance, appears to be a harsh decision. After the EEOC failed to bring an action within the statutory period of 180 days, Jones failed to exercise his right to maintain a private action. He also failed to exercise his right to intervene in the subsequent EEOC action. Failing to intervene, he allowed judgment to pass in the EEOC action, thereby binding himself as their representee.

The resulting prejudice to the defendant of allowing Jones to proceed with his action provides an additional justification for the *Jones* decision. The statutory scheme is silent as to the time limitation within which the EEOC must proceed to redress the individual's alleged damages. The Supreme Court has held that when Congress has created a cause of action and has not specified a period of time within which it may be asserted, the state statute of limitations should apply.[64] However, in *Occidental Life Insurance Co. v. EEOC*[65] the Supreme Court held that EEOC enforcement actions are not subject to state statutes of limitations because such application would be inconsistent with the federal statute's underlying policies.[66] The necessary investigation of charges and conciliation efforts prerequisite to any litigation lead to lengthy delays and backlogs in the EEOC caseload. Thus, it would be inequitable to bind the EEOC to a state statute of limitation which fails to consider these circumstances. In addition, the EEOC assumed substantial additional enforcement responsibility with the 1972 amendment to Title VII. Thus, because of the recognized caseload burden of the EEOC, an administrative agency with both a shortage of staff and an insufficiency of funds, the EEOC can avoid the governing statute of

62. *See* 42 U.S.C. § 2000e-5(f)(1) (1976). Individuals who have filed charges alleging employment discrimination with the EEOC can sue in their own names if the EEOC dismisses the charge(s) or if within 180 days from filing the charge the EEOC fails to bring suit or enter into a conciliation agreement to which the aggrieved individual is a party. *Id.*

63. *See id.*

64. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 179-82 (1976) (absent a federal statute of limitations governing civil rights actions the court applied the state statute of limitations governing personal injuries); Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946) (the silence of Congress as to a time limitation has been interpreted to mean that the federal court is to adopt the local statute of limitations).

65. 432 U.S. 355 (1977).

66. *Id.* at 366-72.

limitations.[67] However, because a defendant may be handicapped in making his defense due to inordinate EEOC delay in filing the action, the *Occidental* Court held that the federal courts have the power to provide appropriate relief.[68]

The *Jones* court applied the Administrative Procedure Act in considering the timeliness of the EEOC action.[69] Under this Act, unreasonable agency delay and prejudice to the defendant result in dismissal of the action.[70] The *Jones* court's application of the Administrative Procedure Act is in accord with the Supreme Court decision in *Occidental* wherein the Court held that relief may be provided where the defendant is prejudiced by inordinate EEOC delay.[71] The *Jones* court dismissed the action in consideration of this showing of prejudice by Bell Helicopter.[72]

In spite of the provisions in Title VII for individual participation, private claimants may feel safe in relying upon the EEOC to pursue their claims. Although it appears unfair to punish Jones for bureaucratic delays of the EEOC, it is even more unjust to prejudice Bell Helicopter for the combined delays of Jones and the EEOC by allowing a nine-year-old claim to be pursued against it. Nevertheless, the result in *Jones* thwarts the purposes of the Civil Rights Act of 1964 because potential discrimination remains unexamined. Although the case is technically correct in its application of the statute and the doctrine of res judicata, the result does not provide relief for the aggrieved individual. For this reason, application of *Jones* should be confined to the facts of the case.

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67. *Id.* at 369-71.

68. *Id.* at 373.

69. 614 F.2d at 1390. *See* 5 U.S.C. §§ 555(b), 706(1), (2) (1976). An alternate means by which the court could have dismissed Jones' case was to invoke the applicable statute of limitations. The Texas statute of limitations for personal injuries is two years. TEX. REV. CIV. STAT. ANN., art. 5526 (Vernon Supp. 1980). The Fifth Circuit has applied this statute of limitations in Title VII cases in the past. Dupree v. Hutchins Bros., 521 F.2d 236 (5th Cir. 1975). *See also* Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1378-79 (5th Cir. 1974). However, it is unclear whether *Occidental* can be applied to individuals pursuing Title VII claims to save them from the governing statute of limitations. *See* notes 64-68 and accompanying text *supra*.

70. *See* Chromcraft Corp. v. EEOC, 465 F.2d 745, 747 (5th Cir. 1972). The factors resulting in dismissal under the Administrative Procedure Act were set out in dictum in EEOC v. Exchange Security Bank, 529 F.2d 1214, 1216 (5th Cir. 1976), and Chromcraft Corp. v. EEOC, 465 F.2d at 747, and were upheld in EEOC v. Moore Group, 416 F. Supp. 1002, 1004 (N.D. Ga. 1976).

71. *See* 432 U.S. at 373.

72. 614 F.2d at 1390.